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Bennie EDWARDS and Joann Edwards,
Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*, *Defendants,*

The Celotex Corporation,
Defendant-Appellant.

No. 92-1557.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1993.

Before POLITZ, Chief Judge, GOLDBERG and EDITH H. JONES, Circuit Judges.

GOLDBERG, Circuit Judge:

This case epitomizes the way that toxic tort litigation has corroded our judicial system. Here we have an asbestos poisoning dispute in which the defendant has sought the protection of the bankruptcy laws to shield itself from the multitude of claims generated by this one-time miracle fabric turned cancer-causing nightmare. To the bankruptcy court now falls the herculean task of managing the problems generated by the unprecedented magnitude of these disputes. It is this court's duty to insure that the case management tools the bankruptcy court utilizes to control these conflicts do not overwhelm its primary obligation to dispense justice.

The precise question before us centers around the power of bankruptcy courts to stay proceedings pending in other courts which might have some effect on the ability of the bankruptcy judge to manage the estate. The Bankruptcy Code provides judges with those equitable powers essential to serving the twin aims of bankruptcy law; protecting the debtor from the tentacles of his or her creditors and, fair distribution of the estate. See H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6296-97. We must decide what limits must be placed on the bankruptcy court's power to insure that both debtors and creditors remain adequately protected.

No usurpation is intended in this decision to denigrate the powers of the bankruptcy court, nor did we intend any trespass upon the metes and bounds of bankruptcy courts' treasured turfs. Indeed, neither side to this controversy has a perpetual lease or any tenure of ownership that is infrangible and indestructible. It is not a struggle between any potential usurpers. Instead, both the district court and the bankruptcy court should both use what they think are appropriate transits and calipers in surveying their jurisprudential turfs.

While cognizant of the repercussions that our opinion may have on other disputes, parties, etc., we should be careful to make decisions based only upon the merits of the particular cases before us. In the instant case, plaintiffs wish to execute a supersedeas bond against a non-bankrupt surety. Because the appeal for which the bond was posted has terminated, the bankrupt and therefore also the bankruptcy court have lost any control over this asset. Consequently, we decline to extend the reach of the bankruptcy court's authority to stay these proceedings and we affirm the ruling of the district court in releasing the supersedeas bond to the plaintiffs.

I. Facts

In April of 1989, the United States District Court for the Northern District of Texas entered a $281,025.80 judgment in favor of Bennie and Joann Edwards and against the Celotex Corporation ("Celotex") for asbestos-related injuries. To stay execution on this judgment while pursuing an appeal, Celotex posted a supersedeas bond for $294,987.88. Northbrook Property and Casualty Insurance Company ("Northbrook") served as surety on the bond. Northbrook, also Celotex' insurer, secured their participation in the bond using insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex.

In an opinion issued on September 20, 1990, this court affirmed the plaintiff's judgment against Celotex. Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151 (5th Cir. 1990). Celotex did not move for rehearing or a stay of the mandate and, on October 12, 1990, the mandate issued. That same day, Celotex filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.

The filing of Celotex' Chapter 11 petition automatically stayed the continuation of all "proceedings against any of the Debtors" and the commencement of "any act to obtain possession of property of any of the Debtors." 11 U.S.C. §§ 362(a)(1) and (3). On October 17, 1990, the bankruptcy judge augmented the protection afforded the Debtors by the automatic stay, employing the broad equitable powers available to bankruptcy judges under 11 U.S.C. § 105. The bankruptcy judge issued an order staying

all proceedings against Celotex, including those proceedings where "the matter is on appeal and a supersedeas bond has been posted by the Debtors."[1]

On May 3, 1991, the plaintiffs filed a motion in the district court seeking to enforce the supersedeas bond against Northbrook as surety on the bond. See Fed.R.Civ.P. 65.1.[2] Northbrook and Celotex opposed this motion, asserting that any proceeding to execute the bond was stayed by the Celotex bankruptcy.

However, let us be absolutely clear that the bankruptcy court's order does not, on its face, apply to the proceedings to execute the supersedeas bond against Northbrook. A careful reading of the bankruptcy court's order reveals that it forbids all proceedings or claims involving the debtor, and makes no

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[1] See Order Granting Emergency Motion for Determination of Applicability of § 362 Stay to Pending Matters Or, in the Alternative, for Extension of § 362 Stay Pending Matters. The pertinent section of this order reads: "3. Notwithstanding any exceptions or limitations to the automatic stay contained in § 362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors."

[2] Federal Rule of Civil Procedure 65.1 states, "Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action."

reference to proceedings against third parties. Thus the section 105 stay would not, as written, prevent the district court from executing the bond against Northbrook.[3]

The district court entered the Bond Order on May 27, 1992 granting execution against Northbrook on the bond. Thereafter, Celotex filed its notice of appeal.

II. Jurisdiction

The threshold question in this appeal is whether the district court had jurisdiction to determine the applicability of the bankruptcy court's stay. Celotex argues that the district court lacked jurisdiction to consider the plaintiffs' motion to execute the supersedeas bond because the bankruptcy court in Florida, where Celotex' Chapter 11 case is pending, has exclusive jurisdiction over all issues related to the bankruptcy. 28 U.S.C. § 1334(a) and (d). The difficulty underlying the determination of whether the district court had jurisdiction to hear the plaintiffs' motion is that this issue turns on the question of whether the bond is part of the Debtor's estate. However, this question is bound up in the merits of appellant's claim.

The jurisdictional grant of 28 U.S.C. § 1334(d) gives the bankruptcy court "exclusive jurisdiction of all of the property,

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[3] As a relevant aside, we take note of the fact that the bankruptcy court in this case held that the stay as issued does apply to the proceedings in this case. See In re Celotex Corp., 128 B.R. 478, 484 (Bankr.M.D.Fla. 1991) ("[w]here bankruptcy courts in 'mega' cases such as this are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute.")

wherever located, of the debtor as of the commencement of such case."[4] This jurisdictional grant is limited by section 1334(b) which provides that the bankruptcy court only has "original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11." 28 U.S.C. 1334(b) (emphasis added). Thus we can rephrase the first question presented in this appeal as follows: whether the district court's order implicates property of the estate and therefore falls under the exclusive jurisdiction of the bankruptcy court or instead is considered a merely a related matter over which the district court could properly exercise jurisdiction.

This court has previously held that district courts have jurisdiction to determine whether a bankruptcy court stay applies to proceedings before it. In Hunt v. Bankers Trust Co., this court ruled that the issue of whether "the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending . . . and the bankruptcy court." 799 F.2d 1060, 1069 (5th Cir. 1986) (citing *In re Baldwin-United Corp. Litigation*, 765 F.2d 343, 347 (2d Cir. 1985)); *see also, Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (district courts retain jurisdiction to determine applicability of stay of litigation pending before them). The district court had jurisdiction to evaluate whether the motion to execute the supersedeas bond would fall under the exclusive jurisdiction of the bankruptcy court.

III. Automatic Stay

We now turn to whether the automatic stay, 11 U.S.C. 362(a), prevents the district court from proceeding with the execution of the supersedeas bond. The automatic stay provisions

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[4] The bankruptcy courts sit under the auspices of the district court in the jurisdiction for which they operate. 28 U.S.C. § 157(a).

of the Bankruptcy Code enable bankruptcy courts to take control of all of the assets of the debtor giving the court opportunity to survey the landscape of debtor's financial condition before reorganizing the estate. *Hunt v. Bankers Trust Co.*, 799 F.2d at 1069.

A victorious plaintiff who obtains a bare judgment against a defendant becomes an unsecured judgment creditor of that defendant. The judgment is payable immediately, but a defendant may obtain stay of execution on the judgment by posting a supersedeas bond. See Fed.R.Civ.P. 62(d). A defendant who posts a supersedeas bond retains a reversionary interest in the bond subject to divestment.

In many cases, the supersedeas bond will be posted by a third party. *See e.g. Southmark Corp. v. Riddle* (*In re Southmark Corp.*) 138 B.R. 820, 824-25 (Bankr.N.D.Tex. 1992). In exchange for agreeing to post the supersedeas bond, the third party normally takes some sort of security from the judgment debtor. Id. In this case, Northbrook acted as surety on the bond securing its interest with insurance proceeds from Celotex' policy with Northbrook. See In re Celotex Corp., 128 B.R. at 480.

Celotex argues that as the judgment debtor, it has an identity of interest with Northbrook as the surety of the supersedeas bond. Therefore, they reason that the bankruptcy court was justified in applying section 362 to stay any proceeding against Northbrook. Celotex cites the Fourth Circuit decision in A.H. Robbins Co. v. Piccinin (*In re A.H. Robbins*) in which the court held that "'there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants' . . . . [This occurs] when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." 788 F.2d 994, 999 (4th

Cir. 1986), *cert. denied* 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) (citing *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (Bankr. S.D.N.Y. 1983)).

Celotex argues that because Northbrook received a security interest in the insurance proceeds, releasing the bond to the plaintiffs will allow Northbrook to automatically recover its rights to those proceeds. This result would diminish the total amount available to be paid out to the remaining claimants. Therefore, appellants ask us to allow the bankruptcy court to stay execution on the supersedeas bonds in order to preserve as much of the debtor's estate as possible.

The wording of section 362(a) belies Celotex' argument. The statute states that the automatic stay is applicable to "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor . . . (3) any act to obtain possession of property of the estate." Thus the statute limits the bankruptcy court to stays in only those proceedings in which the debtor or his or her property is in controversy. Because this is suit against Northbrook, not the bankrupt, the only way the automatic stay could apply is if the court finds that the bond is property of the debtor's estate.

We recognize that the Bankruptcy Code defines property of the estate quite broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). *See U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983) (holding that the definition of property of the estate includes property in which debtor no longer has a possessory interest). Nevertheless, we do not believe that this definition is so broad as to include the kind of interest under consideration in the present case.

In considering the same issue in a case involving another

asbestos claimant to the Celotex estate, the court in *Willis v. Celotex Corp.* rejected Celotex' reasoning, stating that the guarantor has a duty "separate from and independent of Celotex' duty to pay the judgments." 978 F.2d 146, 148 (4th Cir. 1992) *cert. denied* ____ U.S. ____, 113 S.Ct. 1846, 123 L.Ed.2d 470 (1993). Because there was no identity of interest between Celotex and its guarantor, the proceedings against the guarantor of the supersedeas bond were not stayed under § 362(a)(1). Id. at 149. The obligations of a surety are sufficiently independent to provide the basis of an action by the judgment creditor to collect on the bond unfettered by the automatic stay provisions of the Bankruptcy Code.

In an analogous case this court decided that any payments made under a secured letter of credit do not constitute property of the debtor. *Kellogg v. Blue Quail Energy Inc. (In re Compton Corp.)* 831 F.2d 586, 589 (5th Cir. 1987), modified on other grounds, 835 F.2d 584 (1988) ("When the issuer honors a proper draft under a letter of credit, it does so from its own assets and not from the assets of [the debtor] who caused the letter of credit to be issued."). Because the letter of credit is not part of the Debtor's estate, we ruled that the bankruptcy court could not enjoin a payment of funds from the letter of credit to the beneficiary. Id. This court reasoned that central to the letter of credit is the independence principle in which the "issuers obligation to the letter of credit beneficiary is independent from any obligation between the beneficiary and the issuer's customer." *Id.* at 590.

The concerns which the court considered relevant to the letter of credit are similarly relevant to the surety-debtor relation at issue here. In re Southmark, 138 B.R. at 828 ("the supersedeas bond or undertaking on appeal resembles the secured letter of credit"). The promise of the bank to pay on a letter of credit is indistinguishable from Northbrook's promise to act as surety on the supersedeas bond. In both cases the promise is to perform an obligation of the debtor when and if the debtor becomes unable

to do so itself. The surety's obligation on a supersedeas bond once the appeal has been completed is as separate and independent from the principal's obligation, as is the bank's obligation on a letter of credit. Thus the automatic stay provisions of § 362(a) do not apply to the guarantor of a supersedeas bond because the bond is not property of the bankrupt's estate once the bond has matured and become enforceable. It was therefore proper for the district court to allow the judgment plaintiffs to execute the supersedeas bond against the surety as a separate and independent obligor on the debt.

The bankruptcy court holding jurisdiction over Celotex' bankruptcy itself admitted that "[w]here a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy code." *In re Celotex Corp.*, 128 B.R. at 482. In this case, because the appeal has been completed and mandate issued, the claim Celotex may have once had on the supersedeas bond has thereby terminated.

This opinion should not be read to infer that the bankruptcy court lacked authority to issue a stay order over supersedeas bonds generally. Our decision today is limited to the holding that the bankruptcy court lacked authority over this particular supersedeas bond. Because the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation.

While we need not state the precise reach of § 362(a) to third parties, we hold that the automatic stay cannot be invoked to paralyze judgment creditors from pursuing the surety of a supersedeas bond once the debtor has lost the appeal for which the bond was posted.

IV. Section 105 Stay

Turning now to the more difficult issue raised by this appeal, we confront the question of whether the equitable powers granted bankruptcy courts apply to the type of non-debtor third parties present here.

Celotex argues that section 105 of the Bankruptcy Code gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority. Section 105(a) states, in part, that the bankruptcy "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In *In re S.I. Acquisition, Inc.* this court recognized that a bankruptcy court has broad discretionary power under section 105 to affirmatively stay proceedings in other courts. 817 F.2d 1142, 1146 n.3 (5th Cir. 1987); *Wedgeworth v. Fibreboard Corp.* 706 F.2d 541, 545 (5th Cir. 1983).

The jurisdiction of bankruptcy courts has been extended to include stays on proceedings involving third parties under the auspices of 28 U.S.C. § 1334(b) which provides for jurisdiction of the bankruptcy court for matters "related to a case under title 11."[5] Appellant argues that under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond.

The Fourth Circuit in *Willis*, examining the very same section 105(a) order at issue in this case, decided that the bankruptcy court's power was sufficient to stay proceedings

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[5] In considering the question of whether co-defendants are included within a § 105 stay, this court held that § 105 "does empower the bankruptcy court to stay proceedings against non-bankrupt entities." In re S.I. Acquisition, 817 F.2d at 1146 n. 3. See also MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93 (2nd Cir. 1988) (section 105 allows stays against third party insurers).

against third parties on supersedeas bonds. The court based its reasoning upon the "magnitude of the task [the bankruptcy court] faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted." 978 F.2d at 149. The number of cases against Celotex is, in fact, quite staggering. Over 141,000 asbestos related bodily injury claims were pending against the debtor Celotex at the time it filed for bankruptcy. *In re Celotex Corp.*, 128 B.R. at 480. Of those, over 100 cases had appeals pending, in support of which Celotex claims to have posted over $70 million in supersedeas bonds. *Id.* In light of the "extraordinary facts presented by the Celotex bankruptcy" 978 F.2d at 147, the Willis court concluded that a stay of proceedings to prevent enforcement of supersedeas bonds was a proper exercise of the bankruptcy court's authority under section 105(a).

It is important to remember that the section 105 stay issued by the bankruptcy court does not, on its face, reach to third parties. Thus, taking the bankruptcy court at its word, we are unable to see how the section 105 order could reasonably be applied to the present proceedings which involve a separate and independent third party obligation. The bankruptcy court stay was written to apply only to the debtor and its property. As we have shown in the preceding section, the property of the debtor cannot be extended to include the separate obligations of a non-bankrupt surety. Our decision in *Blue Quail* is particularly relevant as to the separateness of guaranty obligations from the property of a debtor's estate.

However, this court has at times found it appropriate to broadly construe bankruptcy court stays to apply beyond the property of the debtor. In re Davis, 730 F.2d 176, 183 (5th Cir. 1984) (exercising the bankruptcy court's stay powers against non-debtor third parties when the proceedings in question "pose a significant threat to the estate.") Indeed, the bankruptcy court in this case has ruled that the stay, in its present state, would apply

to enjoin the Edward's proceedings against Northbrook to execute the supersedeas bond. *In re Celotex Corp.*, 128 B.R. at 484. The bankruptcy court has decided that even when, "the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the section 105 stay in this Court." *Id.*

Therefore, we cannot simply assume that because Northbrook does not appear to be included on the face of the stay, the bankruptcy court will exempt it from the reach of the stay. The issue presented in this appeal must then be sharpened to the question of whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here.

The Supreme Court has made clear the importance of placing definite limits on the equity powers of bankruptcy courts. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81, 102 S.Ct. 2858, 2876, 73 L.Ed.2d 598 (1982) (plurality opinion) (holding that because bankruptcy courts are non-Article III courts they must be limited in function and authority). This court has itself previously limited the powers of bankruptcy courts in *Wedgeworth v. Fibreboard Corp.* where we held that, "[a]lthough we recognize the court's broad discretion in this area, such control is not unbounded. Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'" 706 F.2d at 545 (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 165-6, 81 L.Ed. 153 (1936)).

While we recognize the burdens which have been placed upon the bankruptcy court by the immensity of litigation pending in this case, we disagree with the Fourth Circuit's proposed

solution in *Willis*. We believe that we cannot afford to shut down the dispensation of justice simply because there is a bankruptcy.[6] Although the idea of using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in this manner.

Celotex made a promise to the prevailing plaintiffs (and the court) by posting the supersedeas bond that the bond would "secure[ ] the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal." Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979); Federal Prescription Service, Inc. v. American Pharmaceutical Association 636 F.2d 755 (D.C.Cir. 1980) (describing the purpose of supersedeas bond to secure appellee in cases where there is some chance of the judgment debtor being unable or unwilling to satisfy the judgment). Supersedeas bonds serve as an obligation on an appellant to insure that an appellee who is deprived of the immediate opportunity to collect his or her judgment will not be prejudiced by the delay.

Allowing appellant to file for bankruptcy and thereby stay execution on the supersedeas bond would eviscerate the very purpose of these bonds. Once the appeal is decided and mandate has issued, the judgment creditor has an enforceable right to collect that which the trial court has previously determined is rightfully his or her own. The supersedeas bond was posted to cover precisely the type of eventuality which occurred in this

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[6] The court in Willis expressed the hope that the bankruptcy court will quickly rule on the motion for relief from the stay. 978 F.2d at 149 n. 5. At this point, aspirations for an expeditious resolution appear quixotic at best.

case, insolvency of the judgment debtor. It is manifestly unfair to force the judgment creditor to delay the right to collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy.

Furthermore, this argument is buttressed by the fact that it is the purpose of the surety relation to provide creditors with another avenue to pursue the debt. Becoming the surety on the supersedeas bond, Northbrook took the place of the judgment creditor in bearing the risk that Celotex would be unable to pay the debt. See Blue Quail, 831 F.2d at 589-90. (holding that for letters of credit, "the shifting of liability to the bank rather than to the [creditor] is the main purpose of the letter of credit. After all, the bank is in a much better position to assess the risk of its customer's insolvency."). If we permit Northbrook to escape its liability by taking refuge under the protective umbrella of Celotex' Title 11 bankruptcy proceedings, we would thereby doubly disappoint the Edwards plaintiffs by first delaying their judgment under a supersedeas bond which they can no longer execute and then, second, failing to enforce the promise made by Northbrook to guarantee that bond. We should not, unless absolutely compelled, let such an unjust result stand. There are no such compulsions here.

Section 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate. *In re Davis*, 730 F.2d at 184. However, the integrity of the estate is not implicated in the

present case because the debtor has no present or future interest in this supersedeas bond.[7] Whatever the ultimate scope of section 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest. Because the appeal has terminated and mandate issued, the surety's liability on the bond matured and the judgment creditors should be allowed to collect.

In coming to the opposite conclusion from the decision we reach today, the Willis court held that the "hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation." 978 F.2d at 150. The idea of hiatus employed by the Fourth Circuit parallels the intent Congress manifested in providing equitable powers to the bankruptcy court in the first place. The power to stay proceedings in other courts was intended as a provisional measure to afford "the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." 1978 U.S.C.C.A.N. at 6296-97. In order that this breathing spell not suffocate the creditor's claims, we must take care to insure that the hiatus not extend to the point where it becomes a permanent vacation.

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[7] The status of the surety agreement which allegedly gives Northbrook a collateralized interest in insurance proceeds owed to the debtor Celotex is not sufficiently demonstrated to suggest that Northbrook and Celotex indeed have an identity of interest such that executing against Northbrook would be the same as proceeding against the property of the debtor. In this respect, the bankruptcy court was correct when it held that "whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of the collateral may be an issue solely between the debtor and its surety." In re Celotex, 128 B.R. at 481.

In addition, we lack evidence of the effect of the agreement between Celotex and Northbrook other than generalized statements by Celotex unrelated to the situation of these plaintiffs. We cannot base a decision on a document that was not presented to the court.

In this case, the judge granted the original stay almost three years ago. The complexities of this litigation make it likely that a satisfactory and fair dispensation of Celotex' assets will be a long time coming. We cannot allow the concern for resolving the monstrous tangle of conflict and contradiction to overwhelm our duty to do justice to these plaintiffs. Due to the likelihood of any stay becoming a perpetual prohibition on plaintiffs collecting their judgment, we hold that the stay is not within the equitable powers of the bankruptcy court for the situation at bar.

These plaintiffs have survived many long years fighting through the system. On October 12, 1990, they emerged with what appeared to be a final victory in this protracted litigation. Greeting them was Celotex, postponing the plaintiff's relief with the claim that because there are so many other victims of this terrible poison, the Edwards will have to postpone yet again the day in which they receive what is their due. It is our job to see that they wait no longer. The Edwards were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal and we should be careful to see that their expectations are not nullified because of a generalized and theoretical concern for the bankrupt's estate.

We conclude by calling attention one last time to the fact that this circuit in *Blue Quail* did not bow in complete obeisance to a bankruptcy court stay. Fairness and equity require that we also not bow in this case where the Edwards' claim is all the more compelling. Having completed the appellate process before the debtor went into bankruptcy, the supersedeas bond matured, and the district court acted properly in executing the bond against Northbrook.

V.

For the reasons stated above, we AFFIRM.

EDITH H. JONES, Circuit Judge, specially concurring:

I agree wholeheartedly with Judge Goldberg's analysis showing the inapplicability of the § 362 stay to this case and with his interpretation of the plain meaning of the Celotex bankruptcy court's § 105 stay order. Because the § 105 stay order did not purport to reach the district court's order against Northbrook in this case, however, I would not reach the question of the bankruptcy court's power to issue such an order.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1557

BENNIE EDWARDS AND JOANN EDWARDS,

Plaintiffs-Appellees,

versus

ARMSTRONG WORLD INDUSTRIES, INC., ET. AL.,

Defendants,

THE CELOTEX CORPORATION,

Defendant-Appellant.

Before POLITZ, Chief Judge, GOLDBERG and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

A few explanatory words are offered. Appellants contend that we should not collaterally attack an order of a bankruptcy court sitting under the jurisdiction of the Eleventh Circuit. This contention fails for two reasons. Primarily, the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe on the Eleventh Circuit's proper jurisdiction. Secondarily, our opinion merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do have appellate jurisdiction, was right.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS AND JOANN EDWARDS,	§	
Plaintiffs,	§	
VS.	§	C. A. No. 7-87-0050
THE CELOTEX CORPORATION, ET AL.,	§	
Defendants.	§	

NOTICE OF APPEAL

Notice is hereby given that The Celotex Corporation, Defendant, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order authorizing the execution and the supersedeas bond that was entered in this action on the 27th day of May, 1992.

DATED: June 25, 1992

Respectfully submitted,

BUTLER & BINION, A
Registered Limited Liability Partnership

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record:

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Attn: Surety Bond Dept.

by certified mail, return receipt requested, on this 25th day of June, 1992.

/s/
Kevin F. Risley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and	§	
JOANNE EDWARDS	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. 7-87-0050
THE CELOTEX	§	
CORPORATION, ET AL.	§	

ORDER

CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause.

Signed this 27th day of May, 1992.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. CA7-87-050-K
EMPIRE ACE INSULATION MFG. CORP., ET AL.,	§	
Defendants.	§	

JOINT STATUS REPORT

COME NOW Plaintiffs, Defendant Celotex Corporation, the only defendant remaining in this case, and Northbrook Property and Casualty Insurance Co., the surety on the supersedeas bond posted by Defendant Celotex Corporation, and submit their Joint Status Report in accordance with this Court's order of January 14, 1992. The parties respond to the Court's inquiries as follows:

(1) A brief statement of the nature of the case, including the contentions of the parties;

This case was settled between plaintiffs and all defendants except Celotex Corporation ("Celotex"). The case was tried to a jury in April of 1989. On April 17, 1989, upon the jury's verdict, the court entered judgment in plaintiffs' favor and against Celotex in the amount of $280,753.80. Upon Celotex's request,

Northbrook Property and Casualty Company ("Northbrook"), as surety, joined Celotex in issuing a supersedeas bond in the amount of $294,097.88 to stay execution of the judgment pending appeal. Celotex appealed the judgment to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment in a reported opinion. *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151 (5th Cir. 1990). Celotex did not file a petition for rehearing, and the Fifth Circuit issued its mandate of affirmance to this court on October 12, 1990. On the same date, Celotex filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, in response to an emergency motion filed by Celotex, the bankruptcy court entered an order pursuant to §105 of the bankruptcy code enjoining all entities "from commencing or continuing any judicial, administrative or other proceeding involving the Debtors, regardless of who initiated the proceeding, whether the matter is on appeal and a supersedeas bond had been posted by the Debtors, or, the appellant in the appeal was one of the Debtors."

On or about May 3, 1991, plaintiffs filed a motion in this case under Rule 65.1 of the Federal Rules of Civil Procedure, seeking leave of court to enforce the terms of the supersedeas bond posted on behalf of Celotex by Northbrook. Northbrook filed a memorandum in opposition to the motion on or about May 21, 1991, and Celotex filed a response in opposition to the motion on or about May 22, 1991. Celotex and Northbrook took the position that plaintiffs' effort to enforce the supersedeas bond is a proceeding against the debtor in bankruptcy and against the property of the bankruptcy estate that the

bankruptcy court has the power to enjoin, and that the bankruptcy has enjoined the type of motion asserted by plaintiffs in this case by its order dated October 17, 1990. On June 13, 1991, the bankruptcy court entered its Omnibus Order on Motion To Lift Stay with Regard to Celotex Appeals and To Release Supersedeas Bonds Thereon which held, *inter alia*, (1) a supersedeas bond is property of the estate during the appeal; (2) judgment creditors of Celotex are enjoined from proceeding on any supersedeas bond without first vacating the §105 stay; and (3) the October 17, 1990 §105 stay remained in effect. On July 29, 1991 Celotex filed a supplemental response in opposition to plaintiffs' motion advising the court of this order. On August 5, 1991, the court invited the plaintiffs to reply to Celotex's supplemental response, and plaintiffs did so. Plaintiffs' motion to enforce the supersedeas bond remains pending, and disposition of the motion is the only action that remains for the court in this case.

(2) Any challenge to jurisdiction or venue;

Celotex argues that this proceeding is stayed by operation of 11 U.S.C. §362(a) and by express injunction issued by the bankruptcy court. Celotex and Northbrook take the position that the bankruptcy court is the appropriate and exclusive forum to determine whether the bankruptcy stay should be lifted and that the bankruptcy court has exclusive jurisdiction over the property of the estate pursuant to 28 U.S.C. §1334(a) and 28 U.S.C. §157. Plaintiffs take the position that the bankruptcy court has no jurisdiction to restrain plaintiffs' collection efforts against third parties such as Northbrook, which is properly before the court under Fed.R.Civ.P. 65.1.

No other challenge to the jurisdiction or venue of this court has been asserted.

(3) A brief description of all pending motions, including the dates the motions and any responses thereto were filed;

Plaintiffs' Motion for Release of Supersedeas Bond, filed on or about May 3, 1991;

Celotex's Response in Opposition to Motion for Release of Supersedeas Bond, filed on or about May 22, 1991;

Northbrook's Memorandum in Opposition to Motion for Release of Supersedeas Bond filed on or about May 21, 1991;

Celotex's Supplemental Response to Plaintiff's Motion for Release of Supersedeas Bond, filed July 29, 1991; and

Plaintiffs' Reply to Celotex's Supplemental Response, filed on or about August 20, 1991.

(4) A brief description of any matters which require a conference with the Court;

Plaintiffs believe that their Motion for Release of Supersedeas Bond may be appropriate for a hearing or conference with the Court. Defendant maintains that any such hearing or conference would violate the automatic stay of 11 U.S.C. §362(a).

(5) An assessment of the likelihood that other parties will be joined, identities of potential parties and an estimate of the time needed for joinder of such parties;

Not applicable.

(6) An estimate of the date by which discovery can be completed;

Not applicable.

(7) Whether a jury has been demanded;

Not applicable.

(8) Whether the parties will consent to trial (jury or nonjury) before a U.S. Magistrate Judge.

Not applicable.

(9) (a) An assessment of the prospects for settlement,

(b) The status of any settlement negotiations already conducted, and

(c) The specific date, place and time of a formal settlement conference at which the parties and their counsel shall appear *in person* to discuss settlement of this case;

Not applicable.

(10) Whether the case is ready for trial and the anticipated length of trial;

Not applicable.

(11) Any other matters relevant to the status and disposition of this case.

None.

Respectfully submitted,

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/s/
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By: /s/
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By: _____

ROBERT B. MILLNER
Counsel for Northbrook Casualty
and Insurance Company
[Mr. Millner approved the substance
of this Report but did not review
and approve the final draft].

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Status Report has been circulated to all counsel of record by telecopier and by regular mail on this 3rd day of February, 1992.

/s/_____
BRENT M. ROSENTHAL

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:	Chapter 11
THE CELOTEX CORPORATION, et al.,	Consolidated Case Nos.: 90-10016-8B1 and 90-10017-8B1
Debtors. _____/	

ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF §362 STAY TO PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF §362 STAY TO PENDING MATTERS

THIS CAUSE came before the Court upon the Debtors' Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters (the "Motion"). There being no objection hereto by the United States Trustee, and the Court having considered the Motion, the arguments of counsel regarding the merits of the Motion, the record in the case and being otherwise duly advised in the premises, finds that this Court pursuant to 28 USC §1471(e), has exclusive jurisdiction of all of the property of The Celotex Corporation and Carey Canada Inc., wherever located, and that this Court, pursuant to §§105 and 362 of the Bankruptcy Code, may issue any order, process or judgment as may be necessary or appropriate to carry out the provisions of the Bankruptcy Code and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Debtors' Motion be, and the same is, hereby granted.

2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting for or on their behalf and all other entities (collectively, "Entities") be and each of them are hereby stayed, restrained and enjoined from:

a. Commencing or continuing, including issuing or employing process, any judicial, administrative or other proceeding against any of the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 cases, or recovering a claim against any of the Debtors that arose before the commencement of the Debtors' Chapter 11 cases;

b. Enforcing, against any of the Debtors or against property of any of the Debtors, a judgment obtained before the commencement of the Chapter 11 cases;

c. Taking any act to obtain possession of property of any of the Debtors or of property from any of the Debtors;

d. Taking any act to create, perfect or enforce any lien against property of any of the Debtors;

e. Taking any act to create, perfect or enforce against property of any of the Debtors, any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;

f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; and

g. Offsetting any debt owing to any of the Debtors which arose before the commencement of the Chapter 11 cases against any claim against any of the Debtors.

3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein.

5. The automatic stay under §362 of the Bankruptcy Code and as extended by this Order operates to stay the continuation of pending matters only as against The Celotex Corporation and Carey Canada Inc. and does not operate to stay the continuation of such matters as against any other named

defendant therein unless proceedings under the Bankruptcy Code have been commenced by or against such other named defendant.

DONE AND ORDERED at Tampa, Florida, on October 17, 1990.

/s/
Thomas E. Baynes, Jr.
United States Bankruptcy Judge

cc: Jeffrey W. Warren, Esq.
Lynne L. England, Esq.
Debtors

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March 14, 1994

VIA TELCOPY AND
FEDERAL EXPRESS

Brent M. Rosenthal, Esq.
Baron & Budd, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219

Re: Edwards v. Celotex

Dear Mr. Rosenthal:

This is to confirm our conversation in which you agreed to consent to Northbrook Property and Casualty Insurance Company's filing of an amicus brief in support of the Debtor's petition for a writ of certiorari in the above-captioned matter. Pursuant to Supreme Court Rule 37, I am requesting that you sign, on the line provided below, to confirm in writing your consent to the filing of this amicus brief. After you have done so, please return the document to me.

Very truly yours,

SONNENSCHEIN NATH & ROSENTHAL

By: Lorie A. Chaiten
Lorie A. Chaiten

LAC/lkh

Brent M. Rosenthal, attorney
for the Debtor

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March 14, 1994

VIA FEDERAL EXPRESS

Jeffrey W. Warren, Esq.
Bush Ross Gardner Warren
& Rudy, P.A.
220 S. Franklin St.
Tampa, FL 33602

Re: Edwards v. Armstrong World Industries Inc., et al.
(6 F.3d 312 (5th Cir. 1993).)

Dear Mr. Warren:

Please confirm, by signing below, that Petitioner The Celotex Corporation consents to the filing of an amicus curiae brief by the Northbrook Property and Casualty Insurance Company in connection with the petition for writ of certiorari filed in the above-referenced case. The consent should be returned to my attention.

Very truly yours,

Robert B. Millner
Counsel for the Northbrook Property
and Casualty Insurance Company

RBM/hlf/71298

CONSENT TO FILING OF AMICUS BRIEF:

By: _____
Jeffrey W. Warren